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8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

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11 SLEEPING WELL, LLC, )  
12 Plaintiff(s), ) No. C10-3658 CW (BZ)  
13 v. )  
14 THE TRAVELERS INDEMNITY CO., ) **ORDER GRANTING PLAINTIFF'S**  
15 ) **MOTION FOR STAY OF DISCOVERY**  
16 Defendant(s). )  
\_\_\_\_\_ )

17 Plaintiff filed this action against its insurer seeking a  
18 declaration that defendant was obligated to defend it in the  
19 underlying Sleep Science Partners, Inc. v. Avery Lieberman et  
20 al action and to indemnify it from any adverse judgment. The  
21 dispute seems to turn on whether defendant is correct that the  
22 injury in the underlying action occurred before the policy  
23 became effective and is therefore excluded from coverage by  
24 the terms of the policy.

25 A few months after filing suit, plaintiff moved for  
26 summary judgment that defendant had breached the duty to  
27 defend. Defendant cross-moved for summary judgment that it  
28 had no duty to defend and no duty to indemnify. Judge Alsup

1 denied both motions "without prejudice to renewal after  
2 discovery," finding the existence of several fact issues which  
3 prevented him from ruling. Thereafter this matter was  
4 reassigned to Judge Wilken as being related to the underlying  
5 action. Plaintiff moved for clarification or reconsideration  
6 of Judge Alsup's ruling on the ground that the insurer is not  
7 permitted to take discovery and try to bolster its decision  
8 not to defend. That motion was denied by Judge Wilken on the  
9 grounds that there had not been a manifest failure to consider  
10 a material argument. Plaintiff then filed a motion to stay  
11 discovery, which Judge Wilken referred to me.

12 Both sides seem to agree that the extent to which  
13 discovery is permitted in an insurance coverage declaratory  
14 relief action is governed by state law. Under California law,  
15 the insurer's obligation to defend is more expansive than its  
16 obligation to indemnify. The insurer's obligation to defend  
17 "turns not upon the ultimate adjudication of coverage under  
18 its policy of insurance, but upon those facts known by the  
19 insurer at the inception of [the underlying] lawsuit."

20 Haskell, Inc. v. Superior Court, 33 Cal.App.4th 963, 976  
21 (1995) (quoting Montrose Chemical Corp. v. Superior Court, 6  
22 Cal.4th 287, 295 (1993)). If the insurer believes it lacks  
23 sufficient information to decide whether it has a duty to  
24 defend a claim, it should get the necessary information before  
25 it declines the tender; not after its insured files a coverage  
26 action. As Haskell puts it, "the insurers were either aware  
27 of [evidence that they had no duty to defend] at the time of  
28 the tender or they were not." Id. at 977. In Haskell, the

1 appellate court ruled that the trial court had erred by  
2 delaying the insured's summary adjudication motion on the duty  
3 to defend, until after the insurer had taken discovery.

4       Under state law, plaintiff has a right to have had its  
5 motion for summary adjudication of the insurer's duty to  
6 defend determined shortly after it filed this action and  
7 before defendant engaged in discovery. It is not clear from  
8 this record why Judge Alsup concluded that he could not grant  
9 that motion. It is possible that defendant's cross-motion for  
10 summary adjudication on both defense and indemnity clouded the  
11 issue. Under California law, even after an insurer is found  
12 to have breached the duty to defend, the insurer is permitted  
13 discovery to enable the insurer to address the issue of  
14 coverage and indemnity. Haskell, supra at 978. However, if  
15 such discovery would prejudice the insured's defense of the  
16 underlying litigation, the insured may be entitled to either a  
17 stay of the coverage action or at least a stay of the  
18 discovery in the coverage action. Montrose, supra at 301-02;  
19 Haskell, supra, 978-981. In opposing this motion, defendant  
20 dwells principally on whether the discovery it seeks on the  
21 coverage issue will prejudice plaintiff in the underlying  
22 action and does not meaningfully respond to the argument that  
23 plaintiff is entitled to have a decision on whether defendant  
24 breached its duty to defend before defendant takes any  
25 discovery.

26       **IT IS THEREFORE ORDERED** that plaintiff's motion for a  
27 stay of discovery is **GRANTED** as follows:

28       1. To the extent that defendant is seeking discovery on

1 whether it had a duty to defend, which appears to turn on  
2 whether it was correct in concluding that the injury alleged  
3 in the underlying lawsuit was barred by the policy exclusion  
4 because it occurred before the effective date of the policy  
5 issued, that discovery is **STAYED**.

6 2. To the extent defendant is seeking discovery with  
7 respect to its duty to indemnify, that discovery is **STAYED**  
8 until after the resolution of plaintiff's motion on the duty  
9 to defend. If the Court finds that defendant had a duty to  
10 defend, plaintiff at that point can renew its motion for a  
11 stay of any discovery that it believes is prejudicial within  
12 the meaning of Montrose and Haskell.

13 Dated: March 21, 2011

14   
15 Bernard Zimmerman  
16 United States Magistrate Judge

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18 OF DISCOVERY.wpd

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